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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

LOCAL UNION NO. 698, RETAIL CLERKS' UNION, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR, *Petitioner,*

v.

HARRY ANDERSON, HAROLD D. VERNON and W. A. SEILER, a Partnership doing business as West Point Market, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Local Union No. 698, Retail Clerks' Union, Affiliated with the American Federation of Labor, petitioner, prays that a writ of certiorari issue to review a final judgment of the Supreme Court of Ohio entered in the above entitled case on October 17, 1956 and its refusal to reconsider issued October 31, 1956.

OPINIONS BELOW

The temporary order of the Court of Common Pleas (R. 10) is unreported and is printed in Appendix A attached hereto. The permanent injunction and decree entered by the Court of Common Pleas (R. 117) is printed in Appendix B attached hereto. The opinion

of the Court of Appeals, Summit County (R. 124) is unreported and is printed in Appendix C attached hereto. The permanent injunction and degree entered by the Court of Appeals (R. 131) is printed in Appendix D attached hereto. The decision of the Supreme Court of Ohio (R. 138) is printed in Appendix E attached hereto. The decision of the Supreme Court of Ohio (R. 138) dismissing petitioner's appeal "filed as of right herein" for the reason that "no debatable constitutional question is involved" (R. 138) is reported in 29 Ohio Bar No. 31, October 22, 1956, and is printed in Appendix F attached hereto. The Supreme Court of Ohio refused reconsideration on October 31, 1956. Such decision is unreported but appears at page 884, Ohio State Bar Association's Reports, 29 Ohio Bar #43, November 5, 1956, and is attached hereto as Appendix G.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on October 17, 1956 (R. 138). Rehearing was denied on October 31, 1956 (R. 139). On January 22, 1957, Mr. Justice Reed entered an order extending time to file petition for writ of certiorari to March 14, 1957.

The decision below is reviewable under 28 U.S.C. Sec. 1257 (3). The jurisdiction of this Court more fully appears from the Statement of the Case.

QUESTIONS PRESENTED

1. Whether a state, with no labor relations statute, may enjoin a union's peaceful picketing for a new contract, after the employer had previously destroyed the union's majority and refused to negotiate for a

successor agreement, without depriving the union of free speech rights under the First and Fourteenth Amendments?

2. Whether a labor union, in a state with no labor relations statute, has the constitutionally protected right of peaceful picketing for the purpose of securing a contract for only its members?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments to United States Constitution, Article XIV, Sec. 1, as follows: ". . . nor shall any State deprive any person of life, liberty or property without due process of law; . . ."

Amendments to United States Constitution, Article I, as follows: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

STATEMENT OF THE CASE

Petitioner is a local labor union in Akron, Ohio, affiliated with the Retail Clerks International Association, AFL-CIO. Respondent is an employer, organized as a partnership consisting of Harold Vernon, Harry Anderson, and W. A. Seiler, doing business as West Point Market at 1711 West Market Street, Akron, Ohio. Respondent engages in retailing groceries and meat, and employed nine persons in the grocery department at all times material herein. It was agreed by the parties that respondent's business does not affect interstate commerce, and thus there is no claim that any federal statute applies. Ohio is one of numerous states that has no labor relations statute concerning codes of fair conduct for employers and unions.

On November 12, 1953, petitioner and respondent executed a collective bargaining contract, covering terms and conditions of employment for the nine persons employed in respondent's grocery department (R. 6). This contract contained a so-called union shop provision, wherein all nine employees became enrolled as members of petitioners (R. 6). This agreement expired October 30, 1954 (R. 6).

Prior to the expiration date of the collective bargaining agreement, petitioner sent notice by letter of August 22, 1954, to respondent that it desired to negotiate a new labor contract to take effect at the time of expiration of the 1953-1954 agreement (R. 112).

Thereafter, on or about August 30, 1954, respondent, through one of its partners, Harry Vernon, called each one of the nine employees separately and individually into its office (R. 36-64-71-80). Respondent had prepared a paper for the signature of each employee, signifying that each employee was withdrawing his membership from the union (R. 36-64-71-80). The three employees who testified in the proceedings below stated that they were told to sign the paper or they could not work there (R. 69-71-80). This testimony was never disputed by the respondent in any way. In addition to the threat of discharge, it was further revealed that respondent offered as an inducement to quit the union an insurance plan better than the one provided by the union (R. 72). This testimony was never disputed by the respondent in any way. Six of the employees signed the withdrawal statement, while three refused (R. 68).

Nevertheless, six of the employees involved, including three of those who had signed the withdrawal

statement, attended a union meeting in September, 1954, where the subject of a strike in the absence of a contract was discussed (R. 73). Radabaugh, the union business agent, at a union meeting, told some of respondent's employees that if no contract was secured, he was going to call a strike (R. 75).

Respondent thereafter refused to negotiate with petitioner for a successor agreement on the grounds that petitioner no longer represented a majority of respondent's employees. Respondent employer referred petitioner union to its attorney, where, in meeting had, no substantive terms of a new labor agreement were ever discussed (R. 86-90).

On November 22, 1954, after the expiration of the contract, petitioner placed pickets at front and rear entrances of respondent's store, carrying banners containing the words, "Some employees on strike." The picketing was peaceful at all times. Petitioner did not contact anyone to tell them not to cross the picket line and did not solicit any union not to make deliveries (R. 89). Petitioner's president, Frazee, while on the picket line, did ask some truck drivers who approached the picket line not to make deliveries (R. 95). Frazee conceded that petitioner hoped to bring respondent around to negotiating a contract (R. 96), and that one of the ultimate purposes of the picketing was to secure a contract (R. 96).

Respondent employer on December 8, 1954, filed a petition for injunctive relief in the Court of Common Pleas, Summit County, Ohio, alleging that no labor dispute existed between the parties and that the union's sole purpose in picketing was to coerce the employer to sign an agreement which would compel its em-

ployees to join a labor union against their will (R. 8). Upon a hearing, which consisted of the sole testimony taken in this case, a temporary restraining order was issued enjoining the picketing (R. 10-11). Upon trial, counsel stipulated that the transcript of evidence in the temporary hearing would be offered as all the evidence available, and upon such presentation, a permanent restraining order was issued by the Court of Common Pleas on August 26, 1955 (R. 117).

The Court of Common Pleas recognized that there was a strike on (R. 102) and further recognized the existence of a labor dispute (R. 109). However, the court interpreted the law of Ohio to make it unlawful to coerce a person to negotiate a contract (R. 108).

On appeal to the Court of Appeals for the Ninth Judicial District of Ohio, the judgment below was unanimously affirmed. That court, without any consideration of the undisputed testimony of three union witnesses that the employer made threats and offered inducements, stated that respondent Vernon told the employees he did not wish a union store and "asked" them to withdraw (R. 64-65). The Court of Appeals further stated that none of the employees individually made demands for changes in working conditions, and none of them voted for a strike (R. 125), but the union demanded a new contract (R. 126). Upon this, the Court concluded that the union, without a majority, was seeking to force the employer to bargain for the employment of union members (R. 128). The purpose of the picket line was to coerce employees into joining the union, said the Court of Appeals, and force the employer to accept the union as the bargaining agent (R. 130). This was unlawful conduct.

The Supreme Court of Ohio, when the cause was presented to it, dismissed the proceedings on the ground there was no debatable constitutional question involved (R. 137). This petition seeks review of the erroneous judgment of the Supreme Court of Ohio.

Presentation of the Federal Question

(a) In the Court of Common Pleas, Summit County, Ohio: The federal question was first presented by counsel for petitioner during oral argument following the taking of testimony at the hearing on the temporary restraining order. "I think as long as you don't hamper them in any way or restrain them in any way, as long as you advise them, there is a picket line that comes within your free speech and you can picket (R. 104)." Thereafter, in an answer filed after the hearing on the temporary restraining order, petitioner raised the federal question by the assertion in paragraph numbered 12, " . . . that the defendants are engaged in a legal and lawful picketing . . ." (R. 14).

(b) In the Court of Appeals for the Ninth Judicial District of Ohio: The case was presented under Ohio procedure on law and fact. The federal questions were raised in the same manner as in the Court of Common Pleas by pleading and argument, and were denied by implication in the opinion of the Court of Appeals wherein that court applied its view of the law of Ohio without specifically discussing the federal constitutional question.

(c) In the Supreme Court of Ohio: From the adverse ruling of the Court of Appeals for the Ninth Judicial District, petitioner filed its Motion to Certify Record to Supreme Court (R. 140), where such motion said: "Appellants (defendants) contend that this case

involves a question under the Constitution of the United States and of the State of Ohio, and that is, therefore entitled to appeal to the Supreme Court of Ohio from the Court of Appeals of Summit County, Ohio, as a matter of right pursuant to the provisions of the Revised General Code, Section 2505.29" (R. 140-141). Although not a part of the record, these questions were argued extensively in petitioner's brief in support of the motion. The Supreme Court of Ohio, in Journal No. 42, p. 157, October 17, 1956, stated: "On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause" (R. 138).

REASONS FOR GRANTING THE WRIT

I. Ohio's Restraint of Peaceful Picketing in a Labor Dispute Where a Union Seeks to Gain a Successor Contract Deprives Petitioners of Protected Free Speech Rights

This case presents the important public question of to what extent may states, with no labor relations statute establishing codes of fair conduct for employers and unions, enjoin peaceful picketing as contrary to public policy when unions and employers are engaged in a bona fide labor dispute. More fundamentally, how far may such states go in invoking unlawful purpose doctrines to aid one labor disputant against the other without abridging the standards established by this Court for constitutional protection of peaceful picketing?

Ohio, one of many states with no labor statute, has, by judicial determination of its highest court, set forth bounds of illegal conduct in peaceful picketing which would be enjoined by its courts. In *Chucales* v.

Royalty, 164 O. S. 214, at 224, the Ohio Supreme Court said:

> ". . . the common law public policy of Ohio may still regard peaceful picketing as unlawful where there is no dispute between the employer and his employees and where the picketing is conducted against the employer by persons who were never employed by him and who do not represent any one that ever was so employed and where it is conducted for the purpose of pressuring the employer to compel his employees to become members of the union. . . ."

As a statement of law, restraint of peaceful picketing in such circumstances would probably be upheld by this Court as being within the allowable area set forth in *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532. But the facts of this case are far different from the confines of the doctrine set up in *Chucales* v. *Royalty, supra*, and the legal issues involved are considerably different from any of those before this Court in any picketing case of recent years.

Because of the sharp distinctions between this case and other picketing cases already decided by this Court, and because petitioner believes the questions presented go vastly beyond those before this Court in the Giboney-Hughes-Hanke-Gazzam-Graham[1] line of cases, petitioner wishes to analyze the operative facts with painstaking care and precision.

This dispute went into litigation from a background of an established collective bargaining relationship, a

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[1] *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490; *Hughes* v. *Superior Court*, 339 U.S. 460; *Teamsters Union* v. *Hanke*, 339 U.S. 470; *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532; *Local Union No. 10* v. *Graham*, 345 U.S. 192.

factor present in none of the other recent limitation-of-picketing cases. Petitioner and respondent had entered into a labor contract on November 12, 1953, continuing until October 30, 1954 (R. 6-85-86), and under this contract, every eligible employee had become a member of the union. The collective bargaining relationship was established voluntarily by the parties, upon a showing that the union represented a majority of the eligible employees involved. This factor of majority, or total, union membership at an early stage in the circumstances is not present in any other unlawful purpose picketing case.

At an appropriate time prior to the expiration of the contract, petitioner sent notice to the respondent employer that it wished to negotiate changes in the existing agreement, and thereby continue it for another term (R. 112). Shortly, thereafter, on August 30, 1954, respondent Vernon called each of the nine employees individually into his office, and asked each one of them to sign a notice of withdrawal from the union (R. 79-80). There is direct testimony that Vernon made threats and inducements to three of the employees (R. 80), which is undisputed and uncontradicted on the record. From the nature of the testimony, it is a fair inference that Mr. Vernon made similar threats and inducements to some or all of the six employees who did sign the withdrawal form he had prepared for them. Whatever one may term Mr. Vernon's conduct, it is certain that he took affirmative steps to vitiate the union's majority among his employees. This salient factor is not present in any of the other cases where this Court has approved a state's unlawful object theory to permit it to restrain peaceful picketing, for in the Giboney-Hughes-Hanke-Gazzam-

Graham line of cases, the employers were generally unoffending victims of union pressure.

(In this connection, there is another striking factor in this case: whether or not the union had actually lost its majority, even though a majority signed the withdrawal paper presented to them by Mr. Vernon. At a union meeting in September, 1954, it was testified to at the hearing, three of respondents' employees who actually signed the withdrawal form were in attendance (R. 73), where the possibility of a strike was discussed. If Ohio had some procedure for secretly ascertaining the desires of employees concerning union membership, perhaps these other persons would have secretly voted for the union. On the other hand, in the absence of statutory protection of their right to belong to a union, it is little wonder that three souls less hardy than those who did honor the picket line had no desire to face their employer's wrath and power of discharge, and accordingly, quietly kept their union desires to themselves).

While Mr. Vernon's conduct would certainly be an unfair labor practice under federal law,[2] and under the statutes of many of the states having labor relations codes,[3] it is not suggested here that this Court should attempt to regulate unfair labor practices at a state level. Ohio, as a matter of public policy, may

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[2] Labor-Management Relations Act of 1947, Sec. 8 (a) (1), 29 U.S.C. Sec. 158 (a) (1); see also, 29 U.S.C., Sec. 158 (c).

[3] I.e., Colorado, Ch. 97, Sec. 94 (6), Colorado Statutes Annotated, where similar language to that of the National Labor Relations Act is found; see also, state statutes in Connecticut, SLL 16:227 (Bureau of National Affairs, Washington, D. C.); New York SLL 42:229 (BNA); Oregon, SLL 47:225 (BNA); Rhode Island, SLL 50:227 (BNA); Pennsylvania, SLL 48:221 (BNA); Utah, SLL 55:207 (BNA); and Wisconsin, SLL 60:225 (BNA).

choose as it wishes to allow any kind of employer anti-union conduct which other jurisdictions, both federal and state, may consider to be violative of any code of fair play. Respondent's course of conduct however, is a circumstance to be weighed in asking this Court to appraise the substantiality of the reasons advanced in support of its policy to deny petitioner its right of free communication. *Schneider* v. *State*, 308 U.S. 147, 162.[4] The question then becomes, may a state permit anti-union conduct by an employer which eliminates a union's majority among his employees, and then enjoin the union's peaceful picketing, even if for the purpose of regaining its lost majority, without violating the union's constitutionally protected rights under the Fourteenth Amendment?

Respondent thereafter refused to negotiate with the union on the grounds that petitioner no longer represented a majority of his employees (R. 6). Some three weeks after the expiration of the contract, and after the union's efforts to attempt negotiation of a new agreement had failed, pickets were placed around respondent's business. The three employees who had refused to sign the employer's prepared withdrawal sheet declined to cross the picket line and thus went

[4] In that case, Mr. Justice Roberts said, at 308 U.S. 147, 162: "In every case, therefore, where legislative abridgment of the right is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

on strike. At the hearing, petitioner conceded that one of its purposes in the picketing was to secure a contract with the employer.

The Ohio Court of Appeals took a far more selective view of the facts than are above presented. That court recited that respondent Vernon told his employees he did not wish a union store and asked them to withdraw, without any discussion of the coercive effect of Vernon's activities. The Ohio Court of Appeals emphasized that (1) none of the clerks made a demand for changes in working conditions, (2) none of the clerks voted for a strike, and (3) none of the clerks knew that a strike was on until the picket line appeared. The court ignored these equally operative circumstances: (1) the lawful collective bargaining agent of the clerks made a timely demand for negotiation of a new agreement (the August, 1954, request of the union), and that the collective bargaining agent would normally ask for changes in working conditions if allowed to do so; (2) no strike vote was taken, for none is required by law, but a strike was discussed by respondent's employees at a union meeting (R. 72-73); and (3) the union was acting for its members who were employees of respondent when it commenced picketing, after these employees had been involved in discussions of possible strike action at earlier union meetings (R. 72-73).

The Court of Appeals then later said: "This is a controversy where the union, without a majority of the employees in its membership, seeks, by means of banners and by requests to suppliers of merchandise, to force the employer to bargain for the employment of union members. Is this unlawful conduct as defined in the case law of Ohio? We think it is." The

court accorded controlling weight to the fact that the union no longer had a majority without any legal consideration of how its majority was lost. There is not the slightest evidence of any kind in the record that the union sought to force the employer "to bargain for the employment of union members." Terms of bargaining were never discussed, because the employer refused to meet with the union. Although the previous contract contained a union shop provision, such matters are always subject to collective bargaining and the new contract, if one had ever been attained, could as well have eliminated the union shop clause as retained it.

The Ohio Court of Appeals, later in its opinion, said that no dispute with the employees existed after the expiration of the contract, and then remarked, "The purpose of the picket line was to coerce the employees into rejoining the union and to force the employer, against his will, to accept the union as the bargaining agent of the employees. In such a situation, the picketing became unlawful under the public policy of this state." (R. 130).

Upon any view of the factual situation presented heretofore, it is apparent that the parties were involved in a labor dispute. There was a pressing, existing controversy over the negotiation of a successor labor contract, after the parties had previously lived under an agreement for one year. The Common Pleas court recognized the existence of a labor dispute when it stated, "I think there is a labor dispute if you want my curbstone opinion (R. 109)." Because none of the employees individually presented demands to their employer, the Court of Appeals apparently assumed, without ruling directly, that no labor dispute existed.

The existence of a bona fide labor dispute is important in establishing the context of the questions involved in this case, and demonstrates further that the facts of this controversy take this case far out of the bounds of Ohio's public policy statement in *Chucales* v. *Royalty*, supra.[5]

What remains is the intervention of the state on the side of one of the disputants in a labor controversy by proscribing peaceful picketing as violative of the state's public policy. The state may intervene on the side of disputants in any way it considers reasonable, but may its intervention be justified upon these facts when vital federal constitutional rights are involved? The problem is still that stated by Mr. Justice Frankfurter in *Teamsters Union* v. *Hanke*, 339 U.S. 470, at , wherein he recognized that,

> "The effort in the cases has been to strike a balance between the constitutional protection of of the element of communication in picketing and

[5] In *Chucales*, peaceful picketing was regarded as unlawful (1) where there is no dispute between the employer and his employees, (2) where the picketing is conducted against the employer by persons who were never employed by him and who do not represent any one that ever was so employed, and (3) where it is conducted for the purpose of pressuring the employer to compel his employees to become members of the union. In this case, (1) there was a dispute between the employer and at least some of his employees, (2) picketing was conducted by persons who represented union members who were employed by the employer (at least the three employees who retained their union membership), and (3) not only is there no evidence in the record that the picketing was conducted for the purpose of pressuring the employer to compel his employees to become members of the union, but fair inferences can be reasonably drawn that the picketing had as one of its purposes that of pressuring the employer to refrain from threating his employees with discharge if they chose to keep their union membership.

> 'the power of the State to set the limits of permissible contest open to industrial combatants.' *Thornhill* v. *Alabama,* 310 U.S. 88, 104. A state's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment."

Petitioner asserts that Ohio has gone beyond the fair balance in setting the limits of permissible contest open to industrial combatants. Its judgment, while admittedly entitled to weight, must be limited by the Fourteenth Amendment when it would do away with the constitutional protection of the element of communication in picketing when a union strives to regain that which it had lost through the employer's unfair conduct. These issues are of fundamental public importance in regulating the right of unions and employees to peacefully picket, and ought to be reviewed by this Court.

II. Petitioner Has the Constitutionally Protected Right to Picket for a Contract Covering Only Its Members in States With No Labor Relations Statute

There is a second important question inherent in the facts of this case that ought to be reviewed by this Court.

Notwithstanding all the other events in this case, three of the employees of respondent were active members of the union at the time of the strike. The picket sign language read, "Some employees on strike . . ." Despite the assertion of the Ohio Court of Appeals that the union sought to coerce the employer into the employment of union members and that its purpose was to coerce the employees into rejoining the union, there is not the slightest shred of evidence of any kind from which even a reasonable inference can be drawn that such was the purpose of the union's picketing.

Petitioner's agents admitted at the hearing they were seeking a contract, but nothing was ever said about the scope of the contract. No discussions of any kind were ever had with respondents, and no communications were addressed to them that would indicate in any way the coverage sought by the union in the contract it wanted.

There is actual support in the record for the view that petitioner was seeking a contract covering only those persons who were members of the union and employed by respondents. In its answer, at paragraph 5, the following is found: "5. Defendants deny that no labor dispute exists and by way of answer allege that there is a valid labor dispute and legal strike between *the employer and its employees as represented by this defendant;* that the trial court, in a temporary hearing, so found that there is a valid labor dispute and a valid legal strike (R. 13)" (Emphasis added). And at paragraph 12 of the answer: "12. Further answering, defendants say that there is a bona fide labor dispute and valid legal strike *between the employees as represented by the defendant union* and the employer plaintiff herein . . . (R. 14)" (Emphasis added). All the testimony in this cause was taken prior to the answer, so nothing additional was adduced after the answer was filed.

This being the case, the peaceful picketing for a members-only contract ought to be constitutionally protected. Certainly, a peaceful picket line where a union represented a majority of the employees with the purpose of attaining the negotiation of a contract would be constitutionally protected as an element of communication. The same protection for minority rights ought to be accorded.

It must be remembered again that Ohio is one of the majority of states without any comprehensive labor relations statute. There is no statutory procedure for lawfully ascertaining whether a union represents a majority of an employer's employees. There is no legal requirement, either by statute or common law, that a union in a labor contract represent all the employer's employees who may be within the scope of an appropriate bargaining unit. Ohio has no procedure for determining the scope of a unit of employees appropriate for bargaining, as does the federal statute and the laws of some of the states.[6] In the absence of such provisions, the parties themselves are left to framing the scope of their contract coverage by their own agreement.[7]

Therefore, the parties could have executed a lawful labor contract covering only the three employees who remained loyal to the union. Could not the three employees involved, therefor, peacefully picket their employer through their agent, the union, for a contract

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[6] National Labor Relations Act, Sec. 9, 29 U.S.C. Sec. 159; Colorado, SLL 15:235 (Bureau of National Affairs, Washington, D. C.); Connecticut, SLL 16:230 (BNA); Idaho, SLL 22:102 (BNA); Kansas, SLL 26:220 (BNA), Massachusetts SLL 31:233 (BNA); Utah, SLL 55:211 (BNA), Wisconsin, SLL 60:228 (BNA); New York, SLL 42:234 (BNA); Oregon, SLL 47:225 (BNA); Pennsylvania, SLL 48:225 (BNA); Rhode Island, SLL 50:231 (BNA).

[7] In the instant case, when petitioner and respondents entered into their labor agreement of November, 1953, they voluntarily included nine grocery clerks and omitted three employees in respondents' meat department. With no state procedure to guide them, the parties could as well have included all twelve of the employees under the contract coverage, or could have written a contract covering six employees, or three, or any number they desired. As a matter of fact, the record reveals that at one stage of their relationship, they agreed to relieve two of respondents' grocery clerks of the responsibility of joining the union and benefitting from the contract coverage (R. 89).

covering their working conditions? Could not one single employee peacefully picket his employer for changes in his working conditions, or for a written agreement to define his rights and responsibilities? And if one employee could do it, why not two, or even three, and why could they not do it through a representative to whom they paid dues and held membership, a labor union?

These are some of the problems inherent in restraining peaceful picketing where unions have actual members employed by the employer in states where there are no labor relations laws to mark the bounds of fair conduct. States with procedures to ascertain whether a union has sufficient members in an establishment to merit the lawful status of a recognized bargaining agent and procedures for determining the scope of the employment unit for which the parties are entitled to bargain would have none of these difficulties. But Ohio has chosen to do nothing about such matters among its employers and employees. Left free to establish the bounds of contract coverage by agreement, might not a union then lawfully seek to gain a contract for only its members and exercise its weapon of a peaceful picket line in an effort to accomplish its objectives? And where a union seeks such a contract, may a state be permitted to abrogate the constitutional right of the union and its members to make known to the public the existence of a dispute by the speech mechanism of peaceful picketing? May the state courts be permitted to hide from these penetrating questions by the simple technique of making findings of unlawful purpose without specific evidence in the record to sustain such findings? Petitioner does not believe that constitutional rights can be abrogated so easily by state courts. Restraint of peaceful picketing

by a state in such circumstances is not striking a fair balance on the limits of permissible contest between industrial disputants. This Court ought to so find.

CONCLUSION

For reasons heretofore presented, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF COMMON PLEAS

CASE No. 196206

(Caption Omitted)

Temporary Restraining Order

STATE OF OHIO }
SUMMIT COUNTY } ss

1. This cause came on to be heard on the petition Harry Anderson, Harold D. Vernon and W. A. Seiler, partners doing business as West Point Market, on their motion for a temporary restraining order herein, and the evidence.

2. On consideration thereof, the Court finds that the defendants have continuously since November 22nd., 1954, illegally picketed plaintiffs' place of business; that as a result thereof the plaintiffs have suffered property damage in the past and will continue in the future to suffer damage as the proximate result of the defendants' acts and conduct as shown by the evidence. Unless they are restrained by the Court. Said damages are so difficult of ascertainment as to amount that the plaintiffs have no adequate remedy at law.

3. The Court further finds that among the purposes of defendants for picketing plaintiffs' place of business is the purpose of coercing the plaintiffs into negotiating a contract with defendants.

4. Upon consideration thereof, the Court finds that said plaintiffs are entitled to a restraining order as hereinafter set forth.

5. It is therefore ordered, adjudged and decreed that defendant, Local Union No. 698, Retail Clerks Union affiliated with the American Federation of Labor, and defendant, Retail Clerks International Association, and each of them, is restrained and enjoined from:—

(1) Interfering or threatening to interfere, in any manner, with ingress and egress of anyone to and from the premises of the plaintiffs.

(2) Interfering in any manner with the delivery of commodities necessary to the operation of plaintiffs' business.

(3) Picketing at or near the approaches to plaintiff's place of business, either on Market Street or Hawkins Avenue.

6. This order shall be in force and effect until the hearing of this cause on its merits provided a bond in the amount of Five-Hundred Dollars ($500.00) is furnished by plaintiffs.

Exceptions allowed.

/s/ Stephen C. Colopy
Judge

Approved:
/s/ Davis and Lipps
Attorneys for Plaintiffs

Have seen—not approved. Object to word Illegalling (?) and non inclusion of word vald like dispute & legal strike.

/s/ Robert E. Shuff
Attorneys for Defendants

Filed, Court of Common Pleas, Summit County, December 14, 1954.
Filed, Court of Appeals, Summit County, August 23, 1955.
Filed, The Supreme Court of Ohio, June 20, 1956.

APPENDIX B

IN THE COURT OF COMMON PLEAS

CASE NO. 196206

HARRY ANDERSON, ET AL, *Plaintiffs*

v.

LOCAL UNION NO. 698, ETC., ET AL, *Defendants*

Journal Entry

STATE OF OHIO)
SUMMIT COUNTY) ss

1. This cause came on to be heard upon the pleadings, the evidence and the briefs of counsel, having been regularly assigned for trial, and thereupon counsel for the parties stipulated and agreed as follows:

> It is stipulated by and between counsel for plaintiffs and counsel for the defendants that in this hearing on the merits, on the application of the plaintiffs for a final injunction as prayed for in the petition, the evidence offered and introduced in the hearing on the application for a temporary injunction before Honorable Judge Colopy of this court heretofore may be offered and considered by the court as being all of the evidence offered by the parties hereto on the hearing on the merits, and that evidence will be transmitted to your Honor by a transcript of that testimony and the evidence.
>
> Each of the parties will pay one-half of the costs of the preparation of that transcript.

2. The court, upon the temporary hearing, found that among the purposes of the defendants for picketing plaintiffs' place of business was the purpose of coercing the plaintiffs into negotiating a contract with defendants.

3. The court finds upon the evidence that the temporary restraining order or temporary injunction is depositive of the matter now on hearing for permanent injunction on the ground of res adjudicata.

4. The court, therefore, further finds grounds for this proceeding in equity and that the defendants were acting illegally in picketing the plaintiffs' store and such picketing was done for coercive purposes, all to the plaintiffs' damage and the court finds that the temporary order should be made permanent.

5. Therefore, for the reasons foregoing and upon the evidence adduced as set forth in the transcript of the testimony and the evidence in the hearing on the application for a temporary injunction, the court finds that the temporary injunction should be made permanent.

6. It is, therefore, ordered, adjudged and decreed that defendant, Local Union No. 698, Retail Clerks Union affiliated with the American Federation of Labor, and defendant, Retail Clerks International Association, and each of them is permanently restrained and enjoined from:

(1) Interfering or threatening to interfere in any manner, with ingress and egress of anyone to and from the premises of the plaintiffs.

(2) Interfering in any manner with the delivery of commodities necessary to the operation of plaintiffs' business.

(3) Picketing at or near the approaches to plaintiffs' place of business, either on Market Street or Hawkins Avenue, Akron, Ohio.

Exceptions to defendants. Costs assessed at $ shall be paid by defendants.

Judge

Approved:

Attorney for Plaintiffs

Attorney for Defendants

APPENDIX C

IN THE COURT OF APPEALS, NINTH JUDICIAL DISTRICT

No. 4594

OPINION

Argued Apr. 25, 1956
Decided May 23, 1956

HARRY ANDERSON, ET AL., *Appellees*

v.

LOCAL UNION No. 698, RETAIL CLERKS' UNION, A.F.L., ET AL., *Appellants*

DAVIS & LIPPS
For Appellees.

ROBERT E. SHUFF
For Appellants.

Appeal on Questions of Law and Fact

STATE OF OHIO }
SUMMIT COUNTY } ss

HUNSICKER, J.

This is an appeal on questions of law and fact. The case was tried in this court on the transcript of testimony and the exhibit admitted in the Court of Common Pleas.

Harry Anderson, Harold D. Vernon and W. A. Seiler are partners doing business under the trade name of West Point Market, at 1711 West Market Street, Akron, Ohio. This market is a purely intrastate local business, and independent of any chain store or large corporate enterprise.

Twelve persons are employed by the market; three in the meat department and nine in the grocery department. Only the grocery clerks were members of a union, which

held a contract with the market. This contract expired on or about November 1, 1954.

In August, 1954, prior to the expiration of the union contract, one of the partners, Harold Vernon, told the employees of the grocery department that they did not wish to have a union store. At that time, he asked each of such employees individually, if he or she desired to leave the union, to sign a paper writing indicating he or she wished to withdraw from the union. Six members of the grocery department signed this paper, and three refused to sign. The three meat department employees were never members of any union, and they were not asked to sign or take part in these discussions.

On August 27, 1954, the market received a request in writing from the business manager of the Retail Clerks' Council that the local union wished "to enter into negotiations for amendments and changes in the collective bargaining agreement." Thereafter, the lawyers for the respective parties met, but no action toward a new contract was taken, since the market did not wish to continue as a union store.

The three union members continued to work at the market, even though no agreement was reached by the lawyers, and even though they were told that the market would not continue its union affiliation. None of the clerks personally, either the three in the union or those six who had withdrawn, made a demand on the market for any change in the wages paid, hours of work, or other conditions. None of the clerks voted for a strike. None of the clerks knew that a strike was being called until either the day when pickets appeared at the market or the night before the appearance of pickets. None of the clerks engaged in picketing. Each of the clerks who refused to sign the withdrawal paper appeared for work the morning when the pickets were at the market, and, seeing the pickets, each of them refused to cross the picket line.

A picket was placed at the front entrance to the store, and one at an alley through which the supplies were delivered to the rear of the market. These pickets, it is admitted, kept some customers and many deliveries of supplies from coming to the market. These supplies were halted by the picket holding up his hand to stop a delivery truck, talking with the driver, who then left without delivering his products. There was, however, some delivery of supplies to nearby places, which the market obtained by sending a truck to get such deliveries, and employees or partners of the market also got merchandise from wholesale houses by going direct to the wholesalers.

There is no dispute but that the effect of stopping the delivery of supplies caused great loss to the market.

The clerks who desired to remain in the union never personally have made a demand on the market for any change in the contract, and their agent, so far as the record shows, never asked for any specific changes in the contract. There was, of course, the demand for negotiations with the market and for an amendment to a contract which the market no longer desired to keep in force.

We do not have before us the contract between the union and the market, but it must be assumed that upon its expiration there was no longer a requirement that the employees be members of a union, and that the force and effect of the contract was at an end for all purposes. Certainly, at the expiration of the contract there was no requirement that the market be a union shop, and no requirement that the clerks be union clerks.

This action to enjoin the picketing of this place of business was filed, by the partners who owned the market, several weeks after the union placed its pickets near the store. The trial court granted a temporary order of injunction, and, at a later hearing of the case on its merits, the temporary injunction was made permanent.

There are recurring problems before the courts of this country concerning the right to picket. Each case presents a slightly different aspect of this question, which relates to the rights of employees, employers, and the general public. The pendulum which measures these rights has, during the last twenty years, swung in a wide arc. In the last analysis, however, this case must be determined upon the basis of the law of Ohio.

The case before us does not involve a business engaged in interstate commerce. It is a purely local neighborhood enterprise, in which a union, which once had a contract with a majority of the employees, no longer has such a contract. This is a controversy where the union, without a majority of the employees in its membership, seeks, by means of manners and by requests to suppliers of merchandise, to force the employer to bargain for the employment of union members. Is this unlawful conduct as defined in the case law of Ohio?

We think it is. The latest pronouncement by the Supreme Court of Ohio on the subject of picketing or bannering as an unlawful enterprise is found in the case of W. E. Anderson Sons Co. v. Local Union, etc., 156 O.S. 541. In that case, Judge Hart, who wrote the majority opinion, analyzed the important Federal cases and demonstrated how the trend of judicial thought changed from (prior to 1937) (1) no picketing, since "economic pressure applied by labor unions had been generally regarded by the state courts as prima facie torts unless a justifiable purpose was shown," (2) to the era of unlimited picketing, because to hinder such acts was an infringement of the right of free speech, (3) to the present period where the picketing may be enjoined if it is being conducted for an unlawful purpose.

This court, in the case of Fairlawn Meats, Inc., v. Amalgamated Meat Cutters and Butcher Workmen, etc., No. 4519, Summit County, decided on May 18, 1955, said:

"The case which pronounces the policy of the state of Ohio, with respect to organizational picketing, is Crosby v. Rath, 136 O.S. 352; and, while it was true that, in that case, there was much evidence of violence which accompanied the picketing, yet the court said, at page 355:

"'* * * The thing upon which the defendants are insisting is that the plaintiff discharge her employees unless they become members of one of the defendant unions. There is no reason or convincing authority sustaining the contention of the defendants that they have the right to engage in picketing or boycotting under such circumstances. That this must be the law is clearly indicated by the intolerable and unexplainable predicament in which an employer might well find himself if picketed by two or more hostile unions with each one insisting that the employer discharge his employees unless they become members of that particular union alone.'

"The latest pronouncement by the Supreme Court of Ohio on the subject of the right to picket for organizational purposes is found in the case of W. E. Anderson Sons Co. v. Local Union No. 311, etc., et al., 156 O.S. 541. * * *

"This Court of Appeals has had occasion to pass on the right to picket for organizational purposes in the case of Bean v. Local Union No. 698, et al., 94 O. App. 361, wherein we said:

"'In the absence of a dispute between employer and employees, or between the union and the employer or employees, a labor union may not engage in organizational picketing, even though peaceful, for the purpose of bringing pressure to bear upon the employer to require his employees to join the union.'

"In the instant case the principal object and purpose of bannering the places of business of Fairlawn Meats, Inc., was for the purpose of forcing the great majority of employees to join the union. The resultant acts of the union to secure their object, such as coercion of the suppliers of meats, and picketing on property under control of Fairlawn Meats, was the

result of the failure of the union to secure the organization of the majority of the employees by peaceful means. This failure to convince the employees and the management was then followed by the picketing lines being established."

A situation, similar to that in the Fairlawn Meats Case, supra, and in the Bean case, supra, exists here. No dispute with the employees existed after the expiration of the contract, for even the three union members continued to work; and they testified they had no dispute with their employer. The market became a nonunion establishment by the statement of the employer, and the majority of the employees desired that no union represent them in their dealings with the employer. The purpose of the picket line was to coerce the employees into rejoining the union and to force the employer, against his will, to accept the union as the bargaining agent of the employees.

In such a situation, the picketing became unlawful under the public policy of this state.

A permanent injunction should be issued as was decreed in the trial court. The appellees will prepare the appropriate journal entry.

Injunction allowed as prayed for.

STEVENS, P. J., and DOYLE, J., concur

APPENDIX D

IN THE COURT OF APPEALS, NINTH JUDICIAL DISTRICT

CASE No. 4594

HARRY ANDERSON, ET AL., *Appellees*

v.

LOCAL UNION No. 698, RETAIL CLERKS' UNION, A.F.L., ET AL., *Appellants*

Journal Entry

STATE OF OHIO }
SUMMIT COUNTY } ss

This cause came on to be heard on appeal on questions of law and fact, and by agreement of counsel was submitted to the Court on the transcript of the testimony and evidence offered by the parties in the Common Pleas Court of Summit County, Ohio, as being all the evidence offered by the parties hereto on this appeal, together with the original papers filed in the said Common Pleas Court wherein Harry Anderson, Harold D. Vernon and W. A. Seiler, a partnership doing business as West Point Market, were plaintiffs, and Local Union No. 698 Retail Clerks' Union affiliated with the American Federation of Labor, and Retail Clerks' International Association, were defendants, and the briefs and arguments of counsel.

On consideration thereof, the Court finds that appellants were acting illegally in picketing appellees' place of business and such picketing was done for coercive purposes, all to appellees' damage and that a permanent injunction should issue in favor of appellees and against appellants.

It is therefore ordered, adjudged and decreed that appellants, Local Union No. 698, Retail Clerks' Union affiliated with the American Federation of Labor, and appellant, Retail Clerks' International Association, and each of them, are permanently restrained and enjoined from:

1. Interfering or threatening to interfere with ingress and egress of anyone to and from the premises of the appellees.
2. Interfering in any manner with the delivery of commodities necessary to the operation of appellees' business.
3. Picketing at or near the approaches to appellees' place of business, either on Market Street or Hawkins Avenue, Akron, Ohio.

Exceptions to appellants. Costs assessed at $ shall be paid by appellants.

FOR THE COURT:

Judge

Attorneys for Appellees

Attorneys for Appellants

APPENDIX E

IN THE SUPREME COURT OF OHIO

No. 34885

(Court of Appeals 4594)

HARRY ANDERSON, ET AL., *Appellees* (Plaintiffs)

v.

LOCAL UNION No. 698, RETAIL CLERKS' UNION, A.F.L., ET AL., *Appellants* (Defendants)

Journal No. 42, p. 156. Wednesday, October 17, 1956

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS OF SUMMIT COUNTY TO CERTIFY ITS RECORD:

It is ordered by the Court that this motion be, and the same hereby is, overruled.

APPENDIX F

IN THE SUPREME COURT OF OHIO

No. 34885

(Court of Appeals 4594)

HARRY ANDERSON, ET AL., *Appellees* (Plaintiffs)

v.

LOCAL UNION No. 698, RETAIL CLERKS' UNION, A.F.L., ET AL., *Appellants* (Defendants)

Journal No. 42, p. 157. Wednesday, October 17, 1956.

APPEAL FROM THE COURT OF APPEALS OF SUMMIT COUNTY:

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Summit County, upon the motion of the appellees to dismiss the appeal, filed as of right herein and was argued by counsel.

On consideration whereof, it is ordered, and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellees recover from the appellants their costs herein expended, taxed at $.

ORDERED, that a special mandate be sent the Court of Common Pleas of Summit County, to carry this judgment into Execution.

ORDERED, that a copy of this entry be certified to the Clerk of the Court of Appeals of Summit County, "for entry."

APPENDIX G

IN THE SUPREME COURT OF OHIO

No. 34885

(Court of Appeals 4594)

HARRY ANDERSON, ET AL., *Appellees* (Plaintiffs)

v.

LOCAL UNION No. 698, RETAIL CLERKS' UNION, A.F.L., ET AL., *Appellants* (Defendants)

Journal No. 42, p. 167. Wednesday, October 31, 1956.

REHEARING DOCKET:

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

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In the Supreme Court of the United States

OCTOBER TERM 1956.

No. 837.

LOCAL UNION NO. 698, RETAIL CLERK'S UNION,
Affiliated with the American Federation of Labor,

Petitioner,

vs.

HARRY ANDERSON, HAROLD D. VERNON
and W. A. SEILER,
a Partnership, Doing Business as
West Point Market,

Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Ohio.

STATEMENT OF FACTS.

The Respondent herein will be referred to as plaintiff-employer, and the Petitioner as defendant-union.

The Plaintiff, a partnership, operating as the West Point Market at 1711 West Market Street, Akron, Ohio since 1940 (R. 1) conducted a business of retailing groceries and meats, employing nine in the grocery department and three in the meat department (R. 2).

The defendant is a labor union known as Local No. 698, Retail Clerks' Union, affiliated with the American Federation of Labor and of a parent union known as the Retail Clerks International Association, A.F.L.-C.I.O.

It was stipulated at the hearing for a temporary injunction that the plaintiff's business in no way affects in-

terstate commerce and defendant makkes no claim that any federal statute applies (Defendantt's Brief, page 3).

The plaintiff in its petition allegedd the existence of an unlawful strike and sought an injunctition against picketing and against interference with its buusiness. The Judge hearing the testimony made "findings annd rulings of law," pursuant to which a decree of temporaary injunction was entered. Defendant offered no additioonal testimony on final hearing in the Common Pleas Coourt and stipulated that "on the merits, on the application of the plaintiff for a final injunction as prayed for in thee petition, the evidence offered and introduced in the heearing on the application for a temporary injunction, beforre Judge Colopy of this Court heretofore, may be offered and considered as being all the evidence offered by the paarties hereto on the hearing on the merits" (Transcript, pages 1 and 2.)

The defendant admitted and stipulated that the purpose of the strike here is—

> "to compel or to induce a negotiatioon of a contract between employer and union" (R. 860), and,
>
> "by cutting off delivery of supplies tto the store to bring the employer around to negotiatee a contract." (R. 79.)

and the Court found (R. 84) "damaage both past and prospective, * * * the effect of the pickketing has been the proximate result of it and has produceed some injury and damage," and, "the purpose of throwiing up a picket line is to put some coercive effect there" ((R. 84), and that it is unlawful in the State of Ohio "to coerce a person to negotiate a contract," "to coerce, to prressure in signing a contract." (R. 88).

The defendant claims that on NNovember 22, 1954, when it begun picketing it representeed three employees

in the grocery department. Employees in the meat department were not union members. The employer and Union had entered into a labor contract in behalf of the grocery department employees, which expired October 30, 1954. Prior to the expiration date, employees expressed a dissatisfaction of the Union to the employer, and he presented to the employees of the grocery department a statement prepared at their request reading as follows:

> "The undersigned has withdrawn membership in Local No. 698, Retail Clerks Union, and all its affiliates, including Retail Clerks International Association and Retail Clerk's District Council No. 7, affiliated with the American Federation as of October 30, 1954. I hereby request you as my employer to discontinue deduction of union dues or funds in any form pertaining to the Union from my pay."

Six of the nine in the grocery department signed the foregoing. Prior to October 30, dues were deducted in accordance with a check-off provision and employee authorization. The Union claims this act of the employer is "an unfair labor practice," but says that "Ohio, as a matter of public policy, may choose as it wishes to allow any kind of employer anti-union conduct, which other jurisdictions, both federal and state, may be violative of any code of fair play" (Brief, p. 12). This thrust at Ohio courts and Ohio public policy is both unjustified and untrue as shown by the testimony of the Union's own witnesses. The three employees who did not sign testified under oath: "He (Mr. Vernon) said he would like for me to sign it but I didn't sign it and was not discharged." After she refused to sign she continued to work from August 30th to November 22nd continuously (R. 51 and 52). This witness *did not* vote for a strike (R. 53), and although she started to go to work on November 22nd, she did not go

to work because when "I came out and when I saw the pickets were there, I wasn't going to cross the pickets," and although before she saw the pickets she intended to report for work she refused to cross the picket line when she saw them (R. 51). The second witness called by the Union, Marcella Campbell, testified she left her employment November 22nd "because of the pickets" (R. 54). Counsel for the Union stipulated it wasn't the proper thing for a union member to cross a picket line (R. 57) and that "it is more or less like the Harvard Boys sitting on the Yale Cheering Section." She testified further "it was only when she saw the pickets that she changed her mind and refused to go to work (R. 58); that none of the West Point Market employees voted a strike (R. 58), and that Business Agent Radebaugh said he and not the employees would call a strike (R. 59); that neither she nor any of the other employees told Mr. Radebaugh they wanted pickets (R. 60). They had no complaint about wages or working conditions, and this strike was called by the Business Agent and not by any of the employees of the store (R. 61).

The Union next called Aves Deskins, the third girl who didn't sign. She said she didn't cross the picket line because "I think I would be turning against the people my husband works with" (R. 65). Although she did not sign, she was not discharged (R. 66). She did not vote for a strike nor for the picketing (R. 66) and neither she nor any other employee had anything to do with the placing of pickets at West Point (R. 67.)

The testimony of the three employees utterly fails to bear out or support the Union's claim of coercion on the employer's part, but establishes clearly the union's lack of fair play in representing the employees involved. There is not a single word of testimony supporting the claim of

the Union's loss of majority because of the employer's act or conduct and nothing from which an honest inference might be drawn supporting the Union's mythical claim.

Both trial Courts, which in this instance included the Court of Appeals, ruled that the strike was for an illegal purpose within the law of Ohio, and made findings requisite to issuing an injunction enjoining the defendants from,

(1) Interfering or threatening to interfere, in any manner, with ingress and egress of anyone to and from the premises of the plaintiffs.

(2) Interfering in any manner with the delivery of commodities necessary to the operation of plaintiff's business.

(3) Picketing at or near the approaches to plaintiff's place of business, either on Market Street or Hawkins Avenue.

On appeal by the Union to the Ohio Supreme Court, the appeal was dismissed. It is to be noted that the decision in each Court, Common Pleas, Court of Appeals and Supreme Court, was unanimous in each instance.

It is admitted Ohio is one of the 40 states of the Union, which has not seen fit to pass a labor relations statute. It is not admitted and the weight of the evidence is contrary to the conclusion posed in the Union's first question that the employer destroyed the Union's majority.

DISCUSSION OF THE APPLICABLE LAW.

Just a short time before the Ohio Supreme Court refused to review the case at bar, it had on October 25, 1955, heard the case of *Chucules vs. Royalty,* 164 Ohio St. 214; 129 N. E. (2) 8, 23. Relative to the Fourteenth Amendment, in sustaining the lower court's order of injunction, the Ohio Supreme Court in Syllabus 4 said:

> "The Fourteenth Amendment to the Federal Constitution does not require a state to prohibit voluntary acquiescence in the demands of a union in order that such state may prohibit the Union from exerting pressure by picketing to secure submission to such demands."

In arriving at this statement of the law of Ohio, the Ohio Supreme Court gave thoughtful consideration to the expression of the United States Supreme Court in *International Brotherhood, etc. vs. Hanke,* 339 U. S. 470; 70 Sup. Ct. 773, where the Court said, at page 778:

> "Nor does the Fourteenth Amendment require prohibition by Washington also of voluntary acquiescence in the demands of the union in order that it may choose to prohibit the right to secure submission through picketing. In abstaining from interference with such voluntary agreements a State may rely on self-interest. In any event it is not for this Court to question a State's judgment in regulating only where an evil seems to be most conspicuous."

This Court said relative to the *Swing* case, *et al.,* concerning which there has been some misunderstanding, both in the Courts and among lawyers "that which was decided (p. 778) in Swing, Wohl and Angelos, does not preclude us from upholding Washington's power to make the choice of policy she has here made. In those cases we held only that a State could not prescribe picketing by setting arti-

ficial bounds unreal in the light of modern circumstances to what constitutes an industrial relationship or a labor dispute. When an injunction of a State Court comes before us it comes not as an independent collocation of words. It is defined and confined by the opinion of the State Court."

Hughes, Thornhill, Senn, Swing and *Wisc. E. R. B.* were all considered by this Court in *Hanke.*

We must recount here the United States Supreme Court quoting the Supreme Court of Washington at page 777 as follows:

> "From this fact the conclusion seems irresistible that the union's interest in the welfare of a mere handful of members (of whose working conditions no complaint at all is made) is far outweighed by the interests of individual proprietors and the people of the community as a whole, to the end that little business men and property owners shall be free from dictation as to business policy by an outside group having but a small and indirect interest in such policy."

For the purpose of considering the deceptive and opaque elements in problems of policy this Court says they must be recognized as being "within the domain of a State's public policy," and "the clash of fact and opinion should be resolved by the democratic process and not by the judicial sword. Invalidation here would mean denial of power to the Congress as well as to the forty-eight states."

The position of Ohio and its policy on picketing and injunctions do not run afoul of the policy set in various other states. For example, the great State of Massachusetts, through its Supreme Court, on June 26, 1947 said in *Colonial Press, Inc. vs. Ellis et al.*, 74 N. E. (2d) 1 (p. 1):

"The strengthening of Union for future contests is not sufficient justification for strike, as respects right to injunction."

"A strike for maintenance of union membership agreement was designed to allow augmented strength to union in potential future controversy and hence was a strike for illegal purpose and would be enjoined."

"The federal constitutional guarantee of free speech does not prohibit injunction of picketing in support of unlawful objective."

The Massachusetts case is in many respects parallel to the Ohio case and discusses *Senn, Swing, Meadowmoor, Ritters, Wohl, et al.*, and finds that none are in conflict. Consequently it follows its earlier pronouncement in *Simon vs. Schwachman*, 18 N. E. (2) 1; 301 Mass. 573, where there is not and never has been a dispute between the plaintiff and his employees.

The State of New York has taken a similar position in *Judy Ann Ice Cream Corp. vs. Hefferman*, 132 N. Y. S. (2) 456, where a majority of the employees were not in favor of the union and the union was not asking recognition because it did not represent a majority of the employees, but the union picketed the employer's place of business in order to prevent employer from obtaining supplies so that employer would force its employees into the union, there was no "labor dispute" involved within the meaning of Civil Practice Act providing that no injunction shall be issued in a "labor dispute except under special circumstances."

Nor is the position of the Courts of Ohio in the case at bar contrary to the Courts of New Jersey. The basic right of the plaintiffs to be protected in their business and property is effectively expounded in *Louis Kamm, Inc. vs.*

Flink, 113 N. J. L. 582, later applied by the New Jersey Supreme Court in 1951, in the picketing case of *Outdoor Sports Corp. vs. A. F. of L., etc.,* 6 N. J. 217, at page 229. We quote:

> "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance and annoyance."
>
> "The conduct and action of the defendants and their threats of interference with the business of the respondent clearly come within these principles. The injury threatened and complained of is an irreparable injury which cannot be adequately compensated in damages and therefore an interlocutory injunction should properly have issued under the circumstances."

On page 231 the Court very properly said—citing *Meadowmoor, Gibony, Hughes, Hanke* and *Gazzam:*

> "The policy of a state may rely on the free play of conflicting interest and leave conduct unregulated. On the other hand, a state may deem it a wiser policy to regulate. Regulation may take the form of legislation, judicial decision or the common law. Whatever form the regulation takes it is to be obeyed and the State is left the choice of method and can decide between placing confidence in an injunction proceeding rather than to rely exclusively on a policeman's club."

Without placing further burden upon the Court in our citing the position of many other states which is in full accord with that taken by the Courts of Ohio, we respectfully conclude *Pappas vs. Stacey,* 116 A. (2) 497, decided by the Supreme Court of Maine May 31, 1955, and the appeal therefrom dismissed by the United States Supreme

Court in 350 U. S. 370; 100 L. ed. 770; 76 S. Ct. 117; is conclusive of the appeal in the case at bar and certiorari should be denied. As reported in 116 A. (2) 497, the agreed statement of facts in full are:

1. (That) the said Plaintiff is the operator and owner of a certain restaurant or eating establishment known as and called Theodore's Lobster House, located at 123 Commercial St. in said Portland.
2. That, the said defendants and their agents and servants have been and are conducting picketing at the place of business of your plaintiff.
3. That said picketing has been at all times peaceful picketing.
4. At least three employees of the Plaintiff are on strike, two of whom have been participating in the picketing and the third of whom has been present at the site of the picketing. All three are members of the union, local No. 390 of the Hotel and Restaurant Employees and Bartenders International Union.
5. The defendants and the three employees aforesaid who are on strike have been conducting the picketing for the sole purpose of seeking to organize other employees of the plaintiff, ultimately to have plaintiff enter into collective bargaining and negotiations with the Union, this being done as a preliminary for attempting to organize restaurant employees in other establishments throughout the State of Maine.
6. The Plaintiff employs on an average thirty persons who would properly be subject to organization and of this thirty at least five are sporadic or transient employees.
7. The business of the plaintiff is a lawful business and if the picketing is illegal, the plaintiff has been suffering and will continue to suffer damages in

the conduct of his business, which is irreparable and for which there is no adequate remedy at law."

In the Maine case, as in the case at bar, "there are no grievances existing between the plaintiff and the employees, including the three on strike, relating to wages, hours, and conditions of employment * * * the grievance (if it may be called such), of the defendants, is not with the plaintiff, but with the employees for not joining Local 390."

"Whether the labor-management relationship, ultimately * * * shall take the form of a closed, union, preferential union, or non-union shop, or any other type, is not the point at issue." (p. 499.)

"The picketing in support of such strike, although peaceful, is likewise unlawful and may be enjoined." (p. 499.)

"In this instance the purpose of the strike necessarily is to compel the employer to bring pressure upon the employees to join Local 390. For what other purpose under the circumstances of this case are the employees on strike?" (p. 499.)

"We do not base our decision, however, solely upon the fact of an unlawful strike. Treating the case as if only picketing were involved, we reach the same result." (p. 500.)

"An obvious purpose of picketing—to cause economic loss to the business during non compliance by the employees with the requests of the union."

The restraint of peaceful picketing in the Maine case did not abridge the right of free speech as guaranteed by the Constitution. The U. S. Supreme Court dismissed the appeal, 350 U. S. 870.

CONCLUSION.

Under the facts and circumstances of the case at bar found by the Courts of Ohio, the strike and picketing of the defendants were illegal, for an illegal purpose and were causing plaintiff irreparable damage. The injunction which was granted did not deprive the defendants of any rights and their conduct was not protected by the Constitutional provisions regarding free speech. Jurisdiction and certiorari should be denied.

Respectfully submitted,

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